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No. 88-1062

IN THE
Supreme Court of the United States
October Term, 1988

BEER WHOLESALERS, INC.,

Petitioner,

vs.

MILLER BREWING COMPANY, and
PHILIP MORRIS INCORPORATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND MINNESOTA COURT OF APPEALS

REPLY BRIEF

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REPLY BRIEF OF PETITIONER

A short reply is made on certain points as follows:

STATE COURTS APPLIED BOTH FEDERAL PROCEDURAL AND SUBSTANTIVE ANTITRUST LAW.

Respondents now argue that the state court applied "state law summary judgment standard" in holding there was not adequate proof of any one of the alleged three types of antitrust resale price fixing conspiracies. [*e.g.* Resps. Brf. at p.5]. That is not true. The state court again did not cite any state summary judgment cases as is done in virtually *every* instance by the Minnesota Supreme Court and Appeals Court when reviewing summary judgment involving state substantive law. Instead, the state courts purported to apply only the federal standard set forth by this Court in *Monsanto*; *Matsushita*; *Business Electronics Corp.*; *Anderson*; and *Celotex.* (cited in the Petition). [*e.g.* see the Court opinion in the Petition Appendix at pages A-13, A-18, A-19].

It is obvious there were no independent state grounds in either procedural or substantive state law. This Court has jurisdiction.

FEDERAL APPEAL COURTS ARE SPLIT AND CONFUSED ABOUT RETAIL PRICE MAINTENANCE LAW.

A recent opinion by the Ninth Circuit further exposes the exacerbated split between the Ninth and Seventh Circuits and the deplorable confused state of the antitrust law in view of recent decisions of this Court casting a shadow of doubt on its earlier decisions. *U.S.A. Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687 (9th Cir. 1988) was a two-to-one decision reversing the granting of summary judgment for the defendant. The Panel expressed disagreement with the reason-

ing of Judge Posner for the Seventh Circuit in an earlier antitrust case. In footnote 13, 859 F.2d at 697, the Ninth Circuit Panel cited and quoted from an article in the Duke Law Journal that sarcastically critiqued the views of Judge Posner and other members of the "Chicago School." The irony is that the Ninth Circuit Panel here cites the critique of Judge Posner claiming he himself has gone so far as to overrule this Court's decision in the *Albrecht* case (cited and discussed in the Petition). In contrast, as cited and noted on page 16 of the Petition herein, the latest panel of the Ninth Circuit in the *Jeanery* case questioned the survival of this Court's opinion in *Albrecht*. Thus, what we have is an apparent conflict not only within the Ninth Circuit itself, but also as against Judge Posner for the Seventh Circuit. The courts and legal writers have been calling for this Court to address the law of resale price maintenance in view of the most recent decisions by this Court. The state of the law is in a shambles of confusion and conflict in this subject area. The instant case provides the full panoply of facts for this Court to address every issue of the law of resale price maintenance. The state courts below applied solely federal procedural and substantive antitrust law. This Court should accept the Petition and address the issues.

RESPONDENTS MISSTATE THE FEDERAL RECORD BELOW.

Respondents claim that the Federal District Court required that Beer Wholesalers "not seek injunctive relief in any other action." [Resps. Brf. p.3] That is not true. Judge Devitt's Order of February 26, 1979 only provided that Beer Wholesalers "agree not to seek *preliminary* injunctive relief in any other court." [emphasis herein] Again, Respondents have misstated the Record.

RESPONDENTS FAIL TO DISCLOSE THE REASON FOR THE DURATION OF THIS SUIT.

Respondents' brief repeatedly complains that this case has been pending for nine or ten years (*e.g.* Resps. Brf. p.3). However, they fail to disclose the reason behind such a length of time. During that period of time the Minnesota Beer Brewers and Wholesalers Law was being tested in both state and federal courts. First, Anheuser-Busch Brewing Company challenged the retroactive provision in said law and finally won in the Minnesota Supreme Court. *See, Jacobsen v. Anheuser-Busch,* 392 N.W.2d 868 (Minn. 1986), *cert. denied,* 479 U.S. 1060 (1987). In *Crowley Beverage Company v. Miller Brewing Company,* 862 F.2d 688 (8th Cir. 1988) the Eighth Circuit affirmed the constitutionality of said law prospectively as applied to a terminated wholesaler. The point here is that Beer Wholesalers raised claims under theories calling for *both* the retroactive and prospective application of said law and, thus awaited the outcome of those two cases. Regardless, the duration of this litigation has no bearing on the resale price maintenance claims.

RESPONDENTS MISSTATE THE DISCOVERY RECORD.

Respondents claim, at page 15 of their brief, that "BWI never explored the relationship between Miller and its other distributors in discovery." That is spectacularly not true. Beer Wholesalers sought to discover Respondents' Marketing Manual for the Lowenbrau product. In its opinion, the Court of Appeals noted, with regard to a "National Conspiracy," as follows [Petition Appendix, pages A-13 and A-14]:

> "It also appears that *the two pricing chapters in Miller's Lowenbrau Marketing Manual no longer exist.* . . . Although the existence of a price policy could be inferred from *the disappearance of the price section of the Manual* and there is evidence that Miller attempted to influence BWI's prices, the record is devoid of evidence that Miller coerced other distributors or that they adhered to any pricing policy."

Thus, the truth is that Beer Wholesalers certainly did seek such discovery and did have certain national sales bulletins in the Record, but obviously was thwarted in its attempt to obtain the key evidence. Regardless, the oral threat made against Beer Wholesalers, when taken in its entirety, clearly shows a national resale price maintenance program for said product. The Court of Appeals [Petition Appendix A-12] and Respondents [Resps. Brf. p.14] both failed to quote that particular threatening statement in its entirety [*see*, Petition at p.12] which clearly disclosed expansive expenditures involving a resale price maintenance program that was national in scope.

RESPONDENTS MISDESCRIBE COERCIVE FACTS AND CIRCUMSTANCES.

Respondents now claim, on page 14 of their brief, that Miller made no threat but, instead, merely stated what it might do—raise its prices. Anyone reading that particular oral threat can clearly see that it was not a statement of independent action but, instead, was *conditioned* upon the response of Beer Wholesalers. If Beer Wholesalers did not raise its prices a second time within a few months, (which it did

not want to do to its customers) then it would have to suffer a third price raise by Miller.* That threat and Beer Wholesalers response by raising its prices constituted a "contract, combination or conspiracy" under the antitrust law. Judge Posner clearly set it forth as an example in the *Isaksen* case. [cited and discussed in the Petition] At that point a complete agreement was reached between the parties. Miller cannot evade that fact. Further, the context where that threat was made is that the Miller executive had first led Mr. Bohrer, the President of Beer Wholesalers, to a *remote* part of Beer Wholesalers' warehouse. It was at that point, and in that context, that the threat was made. When Beer Wholesalers raised its prices it was in 'everyday' contact with the Miller representatives about pricing and other marketing matters, hence the raise was fully communicated during the course of business.

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* This Court has repeatedly noted that "Price is the 'central nervous system of the economy,'" and should be set free of interference. *Natl. Soc. of Prof. Engrs. v. U.S.*, 435 U.S. 679, 692, 55 L.Ed. 2d 637, 650 (1978).

CONCLUSION

This case does present this Court with a panoply of factual incidents to consider virtually all the questions that are splitting and confusing the lower courts today when reviewing resale price maintenance law and trying to reconcile the old-line of cases of this Court with its most recent decisions. May the Petition be granted.

DATED: February 3, 1989.

Respectfully submitted,

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